

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Assessment and Collection of)	MD Docket No. 05-59
Regulatory Fees for Fiscal Year 2005)	

COMMENTS OF THE
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

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The National Cable & Telecommunications Association (“NCTA”), by its attorneys, hereby submits its comments in the above-captioned proceeding on the assessment and collection of regulatory fees for fiscal year 2005. NCTA is the principal trade association of the cable television industry in the United States. Its members include owners and operators of cable television systems serving 90 percent of cable customers as well as more than 200 cable networks and others affiliated with the cable industry.

INTRODUCTION AND SUMMARY

In this year’s Notice of Proposed Rulemaking, the Commission proposes to increase the amount payable by each fee category by 2.6 percent to reflect the increase in the regulatory fees mandated by Congress from FY 2004 to FY 2005. With respect to cable television systems, this means that cable fees will increase from \$.70 to \$.72 per subscriber. CARS station fees will increase from \$154 to \$155 per station.

The Commission also proposes to require cable operators to annually report their aggregate basic subscriber counts from the end of the prior year (December 31st) by June 1st of the next year. The FCC would use these figures to audit the fee payments made later in that year. Upon consultation with our member companies, we believe that a June 1st reporting requirement can be met with accurate subscriber information from the previous year and is not unduly burdensome.

NCTA would, however, like to take this opportunity to raise an issue of importance to its cable system member companies: the enormous disparity in the regulatory fees paid by cable operators as compared to direct broadcast satellite (DBS) providers. Cable and DBS compete head-to-head for customers and, as the Commission found last year in its 10th Annual Video Competition Report, “the level of competition among video providers has increased dramatically since our first report in 1994.”¹ The Commission recently stated “that consumers today have viable choices in the delivery of video programming, and they are exercising their ability to switch among MVPDs.”² Indeed, DBS subscribership “continues to grow at double digit rates” and “represents 25% of all MVPD households.”³ DBS providers, DirecTV and EchoStar, rank as the second and fourth largest providers of multichannel video programming service.

¹ *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 19 FCC Rcd 1606 (2004) (“Tenth Annual Report”).

² *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 04-227, ¶ 6, 54, rel. February 4, 2005 (“Eleventh Annual Report”).

³ *Id.* at ¶ 10.

Yet, despite being similarly-situated competitors, the Commission's regulatory fee scheme still treats cable and DBS companies entirely differently. Cable operators pay fees on a per subscriber basis, while DBS companies pay a facility-based fee based on their geostationary space stations. And that facility-based fee, which has not increased as DBS subscribership has grown, is far smaller than the amount paid by cable operators. Specifically, the result was that in FY 2004 the cable industry paid fees in the aggregate of approximately \$46 million while the two major DBS providers, DirecTV and EchoStar, paid fees of approximately \$2 million. As we discuss below, there are mid-sized cable operators serving a fraction of the customers served by DirecTV and EchoStar that pay annual regulatory fees close to or more than what these companies pay.

The disparity between cable and DBS is even more glaring given that the dramatic changes in the video landscape have been accompanied by a significant decline in FCC regulation of cable television systems with the sunset of rate regulation of the cable programming service tier (CPST) in 1999. And it fails to factor in that not only are cable and DBS subject to a host of similar regulatory obligations and participate in a host of policy proceedings affecting their business, but the Commission is more involved with regulating DBS than cable in certain areas. The rationale that justified a disparate approach to these two industries when it was originally adopted in 1996 no longer applies.

In general, the current regulatory fee structure does not reflect the relative costs, nor the relative benefits to consumers, associated with the Commission's

expenditure of resources on cable and DBS. In a highly competitive marketplace, this is ultimately detrimental and unfair to cable companies and cable customers. NCTA urges the Commission to reconsider its severely unbalanced approach to regulatory fees for similarly-situated competitors – cable and DBS – and adopt a more rational per subscriber fee assessment for DBS providers.

DISCUSSION

The Commission first proposed assessing regulatory fees on DBS licensees in 1996.⁴ It considered assessing a per subscriber fee as is imposed on cable systems, but ultimately decided to include DBS in the geostationary space station category (currently \$114,625 per operational station). The FCC's rationale was that costs attributable to regulating DBS operators are more similar to those attributable to regulation of other geosynchronous space stations. In differentiating DBS from cable, it further stated:

Regulatory responsibilities related to space stations focus on policy and rulemaking activities, and are unrelated to the number of end users of satellite services. Moreover, DBS rules do not impose additional regulatory requirements on video service providers that are specifically related to the individual subscriber. Thus, the number of subscribers to a DBS service does not significantly affect the regulatory costs arising from DBS services. By contrast, cable service providers are subject to rate regulation, customer service standards and certain programming obligations. In addition, a subscriber-based formula would penalize DBS licensees who win more subscribers with less space station capacity (and hence lower regulatory costs). Moreover, because DBS licensees are not restricted to the provision of video

⁴ *In the Matter of Assessment and Collection of Regulatory Fees for Fiscal Year 1996, Notice of Proposed Rulemaking*, 61 Fed. Reg. 16432, 16447 (1996) ("1996 Regulatory Fee NPRM").

programming, but rather may provide various non-video services, we concluded that a facility-based fee would ensure that each DBS licensee contributed equitably to the cost of DBS regulation without the need to impose possibly burdensome and overly intrusive reporting requirements necessary to gather information identifying the services offered by individual DBS operators.⁵

The rationale for a facility-based fee for DBS no longer holds, given how dramatically DBS has changed over the past eight years, how cable has been deregulated, and how the Commission's regulatory activities are now framed by a solidly competitive video marketplace. As noted earlier, DBS competes head-to-head with cable and has amassed over 25 million subscribers (as compared to the 4 million it served in 1996). DirecTV and EchoStar are now the second and fourth largest MVPDs, respectively. This growth was spurred in large part by legislative and regulatory actions that enabled DBS to obtain certain cable programming services and provide local broadcast stations to their customers.

Cable has changed too. It has experienced a steadily declining share of multichannel video customers, while its high speed Internet business has grown. Indeed, both cable operators and DBS operators offer new broadband video and non-video services. But the FCC's regulatory responsibilities with respect to cable have substantially diminished during this period with the sunset of regulation of the cable programming service tier (CPST) rates and as more systems are found subject to effective competition.⁶ Moreover, the cable customer service regulation the

⁵ Id.; see also *Assessment and Collection of Regulatory Fees for Fiscal Year 1996*, Report and Order, 11 FCC Rcd 18774 (1996) ("1996 Regulatory Fee Order").

⁶ Where there is effective competition, basic tier and equipment rates are deregulated, and other regulatory obligations under Section 623 of the Act, such as tier buy-through, no longer apply.

Commission alluded to in the 1996 Regulatory Fee NPRM, is now largely a state or local franchise matter. Indeed, the Commission anticipated in the 1996 Regulatory Fee Order “that [its] deregulatory activities will result in reduced [cable] oversight costs in future years.”⁷ Yet cable’s regulatory fees since 2000 have risen nearly 49 percent, from 47 cents in 2000 to 70 cents in 2004. DBS’ regulatory fee assessment for its geostationary space stations increased for fiscal years 2000 through 2003, but actually *decreased* in FY 2004. This only compounds an already out of sync fee scheme that is still based on the faulty premise that the Commission’s regulatory responsibilities with respect to DBS are unrelated to the number of end users of satellite services.

In its 2004 Regulatory Fee Report and Order, the Commission concluded that regulatory fees do not need to be “precisely calibrated, on a service-by-service basis, to the actual costs of the Commission’s regulatory activities for that service.”⁸ It further stated:

Pursuant to section 9(a) of the Act, the Commission is authorized to collect regulatory fees “to recover the costs of . . . enforcement activities, policy and rulemaking activities, user information services, and international activities.” Fees are to be derived by determining the full-time equivalent number of employees performing the activities described, “adjusted to take into account factors that are reasonably related to the benefits provided to the payer of the fee by the Commission’s activities . . .” 47 U.S.C. section 159(b)(1)(A). This provision authorizes the Commission to take into account overall staff costs in implementing its continuing obligation to ensure that the fee

⁷ See 1996 Regulatory Fee Order at 18774, ¶ 57.

⁸ *Annual Assessment and Collection of Regulatory Fees for Fiscal Year 2004*, Report and Order, 19 FCC Red 11662, ¶ 6 (2004).

schedule is consistent with section 9(b)(1)(a), and it also makes clear that the Commission is free to depart from strictly cost-based fees.⁹

Thus, the Commission uses a “costs adjusted for benefits” approach to setting its schedule of regulatory fees. Like cable, DBS and its customers “benefit” from Commission regulation in a variety of ways. DBS is primarily regulated as a spectrum licensee in the International Bureau, where there are ongoing activities, such as the reduced satellite spacing proceeding, which seek to evaluate whether such action would benefit its end users.¹⁰ The Commission also enforces public interest obligations on DBS providers, including political broadcasting requirements and commercial limits on children’s programming.¹¹ DBS operators are also engaged in the on-going proceedings involving compatibility and interoperability with consumer electronics equipment to ensure that their service works effectively with such devices.¹²

Indeed, DBS and cable are subject to comparable, and some cases service-specific, regulatory regimes in several significant areas. DBS providers now offer broadcast signals in local markets and are subject to must carry obligations like cable operators. In addition to mandatory carriage obligations, DBS and cable

⁹ *Id.* at ¶ 7 (emphasis added).

¹⁰ *International Bureau Seeks Comment on Proposals to Permit Reducing Orbital Spacings Between U.S. Direct Broadcast Satellites*, Public Notice, 18 FCC Rcd 25683, rel. December 16, 2003.

¹¹ 47 U.S.C. § 335; *In the Matter of Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992, Direct Broadcast Satellite Public Interest Obligations*, Second Order on Reconsideration, 19 FCC Rcd 5647 (2004).

¹² *See e.g., Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, CS Docket No. 97-80, DirecTV filings, March 28, 2003, December 29, 2003, March 20, 2004, March 22, 2004; EchoStar filings, January 1, 2004, March 15, 2004, March 23, 2004.

operators must comply with retransmission consent, network non-duplication, syndicated exclusivity, and sports blackout requirements.¹³ DBS providers, like cable, are entitled to – and may invoke – the FCC’s processes to enforce “good faith” retransmission consent negotiations with broadcasters under the Satellite Home Viewer Improvement Act. The program carriage rules apply to both cable and DBS and, pursuant to the DirecTV and News Corp. merger decision, DirecTV is subject to program access rules.¹⁴ They both must comply with equal employment opportunity (EEO) rules and reporting requirements.¹⁵

Cable companies and DBS companies have participated in the digital television transition and digital must carry proceedings, and the Commission has considered the impact of the transition on DBS, along with cable and broadcasters in its decision-making.¹⁶ The annual video competition proceeding analyzes the status of the delivery of video programming among all of the MVPDs in the video

¹³ See generally, 47 C.F.R., Part 76, Subpart D (broadcast signal carriage) and Subpart F (network nonduplication, syndicated exclusivity and sports blackout). Pursuant to the Satellite Home Viewer Improvement Act of 1999, the FCC initiated a series of proceedings effecting DBS. See *Implementation of the Satellite Home Viewer Improvement Act of 1999: Application of Network Non-Duplication, Syndicated Exclusivity, and Sports Blackout Rules to Satellite Retransmissions of Broadcast Signals*, Report and Order, 15 FCC Rcd 21688 (2000); *Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues, Retransmission Consent Issues*, 16 FCC Rcd 1918 (2000).

¹⁴ *In the Matter of General Motors Corporation and Hughes Electronics Corporation, and the News Corporation Limited*, Memorandum Opinion and Order, 19 FCC Rcd 473 (2004).

¹⁵ See 47 C.F.R. §§ 76.71-76.79 and 47 C.F.R. § 25.601.

¹⁶ See e.g., *In the Matter of Second Periodic Review of the Commission’s Rules and Policies Affecting the Conversion to Digital Television*, MB Docket No. 03-15; *In the Matter of Carriage of Digital Television Broadcast Signals*, CS Docket No. 98-120, submissions by DirecTV and EchoStar.

marketplace.¹⁷ The Commission's broadband policies also have an impact on both cable and DBS customers.

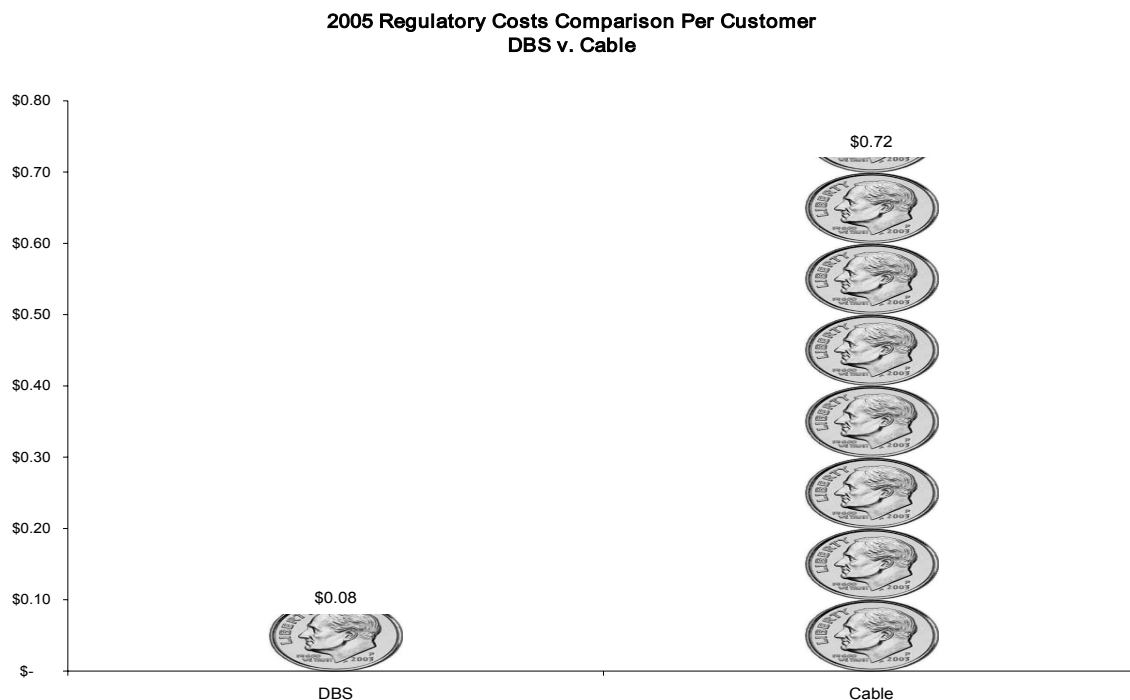
However, unlike cable, DBS is regulated solely at the federal level so the FCC's regulatory oversight is consequently much greater in certain areas. Consumer complaints relating to DBS service, for example, are addressed by the Commission, rather than a local franchising authority as is largely the case with cable systems. The Commission also enforces complaints related to over-the-air receiver device ("OTARD") rules and handles disputes related to market determinations for satellite carriage of local television stations. And, as noted above, the FCC has the statutory obligation to adopt and enforce appropriate public interest obligations for DBS. In enforcing all these rules and requirements, the Commission's regulatory activities associated with DBS now *are* unquestionably related to the number of end users of satellite services at least to the same extent as its regulation of cable.

With comparable – and in some cases, greater – regulatory benefits for DBS customers, the fact that cable pays a disproportionately higher regulatory fee than its main competitor is simply not fair and distorts the workings of what has become a vigorously competitive marketplace.¹⁸ DirecTV has a fleet of eight satellites and EchoStar has a fleet of nine satellites (out of the total 79 geostationary space

¹⁷ See Tenth Annual Report and Eleventh Annual Report.

¹⁸ See e.g., *In the Matter of the Proper Treatment of FCC Regulatory Fees Under 47 U.S.C. § 542(g)*, *Opposition to Petition for Declaratory Ruling*, CSR-6324, June 1, 2004.

station units).¹⁹ Taking DirecTV and EchoStar alone, they would pay an estimated total of \$1.9 million dollars in FY 2005 regulatory fees (\$114,750 x 17) as compared to cable's \$48 million.²⁰ As shown below, on a per capita basis, in 2005, the two major DBS providers would pay on average less than 8 cents per subscriber to cable's 72 cents per subscriber.

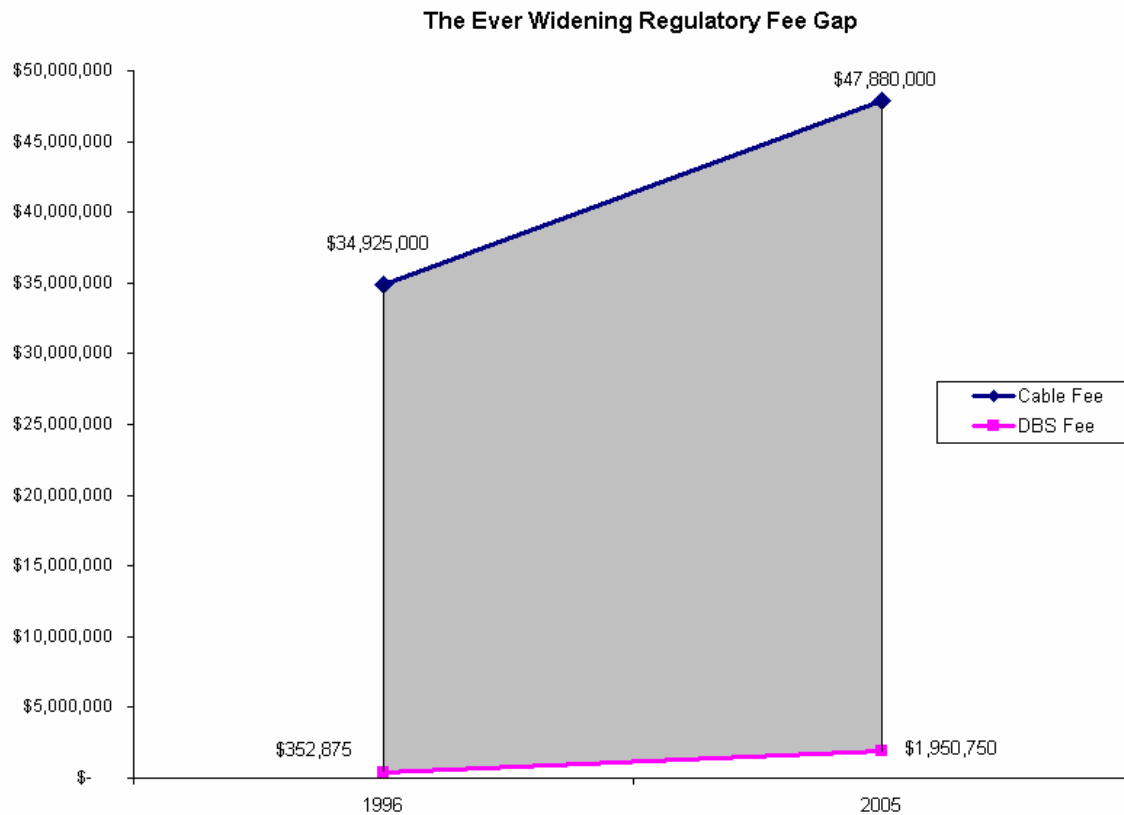


Moreover, the regulatory fee gap has widened over a period when DBS subscribership went from 4 million to 25 million customers. Incongruously, as DBS

¹⁹ See e.g., www.directv.com, Investor Relations, General Information, <http://phx.corporate-ir.net/phoenix.zhtml?c=127160&p=irol-homeprofile>; www.dishnetwork.com, <http://www.dishnetwork.com/content/aboutus/satellites/index.shtml>. In addition, Dominion Video Satellite (marketed as Sky Angel) and Cablevision Rainbow DBS (marketed as Voom) provide subscription DBS services.

²⁰ DBS providers also pay a minimal amount for certain earth stations, but we do not have the information to ascertain this figure. Cable operators also pay fees for CARS stations. In FY 2004, cable operators paid \$154 per CARS station for a total of 900 stations.

has gained on cable, the government has imposed a heavier and more discriminatory fee burden on cable systems.



The 800% higher fee that cable pays as compared to DBS on a per subscriber basis also assumes that DBS operators do not avail themselves under the facility-based fee formula of the provision that permits DBS operators to consider “multiple technically identical geostationary satellites co-located at the same orbital location”

as one station for the purpose of per space station regulatory fee calculation.²¹ To the extent that they do so, their regulatory fees are even lower.

The gross disparity in cable regulatory fees paid by cable operators as measured against DBS is particularly stark when DirecTV and EchoStar's fees are compared to, for example, mid-sized cable operators, such as Mediacom and Insight. Mediacom with roughly 1.5 million subscribers alone paid \$1 million (1,458,000 subs in 23 states at .70 per sub) in FY 2004. Insight paid approximately \$890,750 (1,272,500 subs in four states) last year. In a competitive marketplace, success should be determined by the capabilities of competitors to meet consumer demand most efficiently – not by artificially skewing the marketplace in favor of one provider over another with disparate regulatory fees. When the second and fourth largest MVPDs pay fees that are roughly equivalent to competitors that serve customers a fraction of their size, something is wrong.

The unfairness of the Commission's current fee allocation scheme vis-a-vis cable versus DBS is further evidenced by the fact that the costs attributable to governmental entities, non-profit entities and certain other regulatees, which do not pay regulatory fees, are allocated on a pro-rata basis to all fee payors.²² Assuming the FCC spreads this cost across the total number of payment units per regulated category, cable with 65 million payments units as compared to DBS' fewer than 77

²¹ See Regulatory Fees Fact Sheet, What You Owe – International and Satellite Services Licensees (July 2003) at 2, www.fcc.gov/fees/factsheets.

²² See 47 U.S.C. § 159(h); 1996 Regulatory Fee Order at ¶ 54.

payment units (total number of geostationary space stations for 2004) bears a drastically higher share of the burden of these costs.

Given this gross imbalance and today's regulatory environment, the DBS facility-based formula should be updated to a more rational per subscriber unit fee similar to cable's. Congress anticipated when it adopted the initial regulatory fee provisions in 1993 that the fee categories and fee assessments could change. Section 9(b)(3), "permitted amendments," requires the Commission to add, delete or reclassify services in the fee schedule to reflect additions, deletion or changes in the nature of its services "as a consequence of Commission rulemaking proceedings or changes in law," 47 U.S.C. § 159(b)(3). The Commission has the authority and should act this year to rectify this imbalance in its fee structure.

CONCLUSION

The regulatory fee scheme applied to cable, as compared to DBS, is fundamentally unfair in light of changed circumstances in the video landscape, the diminished regulation of cable television systems, and the benefits that DBS providers and their customers gain from FCC policy and rulemaking activities. NCTA urges the Commission, therefore, to treat cable and DBS in an equivalent manner by imposing regulatory fees on a per subscriber basis for both competitors.

Respectfully submitted,

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